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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1948

TRANSCONTINENTAL & WESTERN AIR, INC.,
PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner seeks a writ of certiorari to review a unanimous decision of the Court of Appeals for the District of Columbia affirming an order of the Civil Aeronautics Board dismissing a petition of Transcontinental & Western Air, Inc., insofar as TWA requested an increase in its domestic mail rate effective prior to the date of institution of the proceeding.

On March 14, 1947, TWA filed a petition with the Board, pursuant to Section 406 (a) of the

Civil Aeronautics Act of 1938,[1] requesting that the Board determine fair and reasonable rates of compensation for the transportation of mail over certain designated routes (R. 8-11). The petition set forth that the rates of compensation currently applicable had been prescribed by the Board by a final order dated October 26, 1945, but asserted that such rates were not, after January 1, 1946, fair and reasonable (R. 10) because of factors commonly affecting all air carriers (rising costs and decreasing loads), and also because of two adverse occurrences (the grounding of Constellation aircraft and a strike of pilots) which affected only TWA (R. 8-9).

The Board, one member dissenting (R. 92-108), granted the motion of public counsel for dismissal of so much of the petition as requested that the Board adjust upward the rate in effect prior to filing of the carrier's petition (R. 60-91).[2] The Board considered that the language and the legislative history of the Civil Aeronautics Act disclosed Congressional intention to apply public utility regulatory principles to the airline in-

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[1] 52 Stat. 998, 49 U.S.C. 486 (a). The provision, in part, directs the Board, upon the petition of an air carrier, "to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft * * * and to make such rates effective from such date as it shall determine to be proper * * *."

[2] The Board did not dismiss that part of the petition requesting an increase in rates commencing with the date of the petition, and proceedings thereon are currently pending before the Board.

dustry by fixing prospective mail rates which afforded opportunity for, but did not guarantee, a fair return (R. 68-70). It believed that Congress did not intend to grant the Board power to change a final rate retroactively because the exercise of such power would destroy the finality of all mail rate determinations, would require the Board to recapture excessive profits as well as to reimburse for past losses, would materially lessen competitive incentives in airline operations, and would adversely affect the financial stability of airline operations since the propriety of rates for prior years would be continuously open to challenge, either as excessive or insufficient (R. 79-81). Such views were among the grounds given by the Court of Appeals for affirming the Board's order (R. 111-115).

While the Government believes that the decision of the Court of Appeals is clearly correct, and while the decision is not in conflict with that of any other Court of Appeals, the question is of such importance in the administration of the Civil Aeronautics Act that its prompt final determination by this Court would seem to be in the public interest. The considerations leading to this conclusion are set forth in a letter to the Department from the Chairman of the Civil Aeronautics Board, which states in part:

> * * * Under the Act, it is possible for another carrier to appeal this same issue to another

circuit court of appeals which might reach the opposite conclusion. If the Supreme Court should then grant certiorari and decide that the Board has legal power to revise final rates retroactively, the Board would be involved in administrative complications which might require years to straighten out. Moreover, until the matter is settled beyond dispute, the financial status of air carriers as related to their right to retroactive mail compensation is uncertain. In addition, if the Act were ultimately construed to require the Board to revise final mail compensation retroactively, the Board may desire to seek legislation at once amending the statute. It is better for the Board to know definitely its powers and obligations now rather than at some future period when substantial amounts of retroactive mail pay will have accrued if the decision in the Court below is not sustained.

For the reasons previously stated, the Government does not oppose allowance of the petition for certiorari.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER, 1948.

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